Robert G. Shearer d/b/a George C. Shearer Exhibitors Delivery Service and/or Air Parcel Delivery Service, Inc. *and* General Teamsters, Chauffeurs and Helpers Local 249, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 6-CA-11279

June 30, 1982

SUPPLEMENTAL DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On March 5, 1982, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions, and the General Counsel filed limited cross-exceptions and a brief in support thereof and in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge.

[1] The Board's original Decision and Order herein is reported at 246 NLRB 416 (1979).

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also find Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge to be without merit. Upon full consideration of the record, we perceive no evidence that the Administrative Law Judge prejudged the case in any way.

In his Decision, the Administrative Law Judge inadvertently stated that George Shearer, rather than Robert Shearer, appeared at a hearing conducted by the Pennsylvania Utility Commission on March 27, 1978. He also stated that the facilities of the two companies at Moon Clinton Road and at McGlaughlin Run Road are at the same location, when in fact they are on adjacent streets. We hereby correct these inadvertent errors.

The Administrative Law Judge failed to include in his Decision a recommended Order. We herein include an Order encompassing his findings as to Respondent's backpay liability.

We disavow the Administrative Law Judge's statement that the four drivers were discharged either because they refused to become owner-operators or because they could not afford to do so. In *Robert G. Shearer d/b/a George C. Shearer Exhibitors Delivery Service*, 246 NLRB 416 (1979), enfd. 636 F.2d 1210 (3d Cir. 1980), the Board found that Respondent discharged these employees because they engaged in protected concerted activity.

[3] In view of our adoption of the Administrative Law Judge's finding that Air Parcel Delivery Service, Inc., is an *alter ego* of Exhibitors Delivery Service, we find it unnecessary to decide whether it is a successor corporation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Robert G. Shearer d/b/a George C. Shearer Exhibitors Delivery Service and/or Air Parcel Delivery Service, Inc., Monroeville and Coraopolis, Pennsylvania, its officers, agents, successors, and assigns, shall pay the following employees the sums of net backpay shown opposite their names, together with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977),[4] less any tax withholding required by law:

James Grassinger	$11,111.15
John Smay	873.01
Albert Altman	25,309.95
Kenneth Wagner	20,334.61

[4] See, generally, *Isis Plumbing & Heating, Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest on backpay in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: This is a backpay proceeding in which a hearing was held on October 26 and November 9, 1981, in Pittsburgh, Pennsylvania. In 1979 the National Labor Relations Board issued a decision finding that the Respondent had unlawfully discharged three employees—James Grassinger, John Smay, and Albert Altman—and ordered reinstatement plus reimbursement and backpay for any loss of earnings suffered by them in consequence of the unfair labor practices committed. The Board also ordered reinstatement and reimbursement of "any other employee terminated on April 24, 1978, as part of the layoff proved . . . to have been unlawful."[1] The record in this proceeding shows directly, and without dispute by the Respondent, that a fourth employee, Kenneth Wagner, was also discharged that day in circumstances precisely in keeping with the total picture of illegal conduct of 1978 by the Respondent. The backpay issue therefore involves four discriminatees.

In the course of the original proceeding a question arose whether a company called Air Parcel Delivery Service, Inc., herein called Air Parcel, became at the time of the events and remains today an *alter ego* of the named Respondent, here called Exhibitors, so as to be equally liable to comply with the total remedial order issued by the Board. Because it did not believe that question to have been properly litigated at the initial unfair labor practice hearing, the Board left that question for later litigation. In this proceeding, as an integral part of his backpay specifications, the General Counsel reasserts

[1] *Robert G. Shearer d/b/a George C. Shearer Exhibits Delivery Service and/or Air Parcel Delivery Service, Inc.*, 246 NLRB 416 (1979).

his contention that Air Parcel always was, and still is an *alter ego* of Exhibitors. Air Parcel denies that allegation.

Briefs were filed by both parties after the close of the hearing.

Alter Ego

On the question of whether one company and a successor are one and the same, I think the really determining factors are whether both do the same kind of business and are owned and operated by the same people. See *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976). If both these elements remain the same, small changes in the day-to-day running of the business mean nothing. If some customers are lost and others picked up, if an office is moved from one address to another, if a different accountant or another bank is used, or even if some of the employees, previously hourly paid truckdrivers, buy their own trucks and continue making the same deliveries for the boss as percentage haulers or owner-operators, the business is the same. These are normal things that happen in all businesses.

Equally irrelevant is the fact that Air Parcel now has, numerically, more customers than did Exhibitors. As a court said, such growth:

> . . . amounted essentially to evolutions, extentions and developments merely, such as could characteristically be expected to occur in the particular business field and in the economic era involved, without having so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees. [*N.L.R.B.* v. *Ozark Hardwood Company*, 282 F.2d 126 (8th Cir. 1960)].

And if the percentage monetary ownership interests of the various owners change, this too is something that has nothing to do with the nature of the business or its management and method of operation. Moreover, it is the developments that took place at the time company 2 is established that carries the greater weight, not the developing status of the new company in later years. *Makaha Valley, Inc.*, 241 NLRB 300 (1979). That is all this case is about, and the continued sameness of both business and management could not be clearer.

For months before the discharge of the four people here involved, Exhibitors, company 1, was owned by Robert Shearer and operated directly by his son George, as manager and supervisor. When the employees, early in 1978, overtly attempted to establish the Union as their bargaining agent, there was talk of turning them into owner-operators, sort of going into business for themselves. Either because they refused to do so or could not afford it, the four drivers were fired. Right then and there, Air Parcel, company 2, was formed, owned half, and half was owned by father and son, with George continuing right on as manager and supervisor. An integral part of the asserted affirmative defense of discharge for just cause, at the time, was that the major customer, as well as economic necessity, made necessary the Employer's switch from hourly paid drivers to owner-operators, and that that is why the men were fired and the new company was formed. But the Board with finality—its decision enforced by the Third Circuit Court of Appeals—rejected that defense, discrediting the Shearers who testified in the earlier proceeding. If the shift of some employees from hourly rate to percentage payment could not serve as an excuse for discharging people, to permit that same change in method of operations to let the now continuing employer off the hook would make a mockery of this entire case.

The business of both these companies is best described as hauling freight by truck. Customers' property is taken by truck from points of origin and trucked to air freight terminals, where it is flown away. In turn, arriving freight is picked up at the air terminal and driven to the customers' locations. For some time prior to March or April 1978, the work was done by Exhibitors, all with drivers who used the Respondent's own trucks. Beginning with the time these four men were discharged, the same work has continued partly with company-owned trucks driven by hourly paid drivers, and partly with owner-operators who are paid both for their personal effort and for the use of their trucks.

In support of his argument that the two businesses are not the same, at this hearing George Shearer kept repeating that Air Parcel is more a broker, a freight forwarder, than a freight hauler in the ordinary cartage business. That it has always been and still is a straight hauler he could not deny, for it had from the start, and still has, several trucks of its own and some hourly paid drivers.[2] What he meant by the word "brokerage" is that Air Parcel arranges business between the shippers and the owner-operators; i.e., acts as broker for its own owner-operator employees by finding business for them to do. The statement can be made of any trucking company which uses owner-operators or percentage haulers, but it does not of itself remove such drivers from the class of straight employees. Air Parcel even today pays the required workmen's compensation insurance for these drivers. Indeed, there is no evidence, nor is it claimed, that they are anything but regular employees, as were their predecessors with Exhibitors.

Still clearer proof that the nature of the business has not changed significantly is the fact that Air Parcel started by directly servicing a company called Burlington Northern Air Freight, whose volume of work constituted 50 percent of all the business Exhibitors was doing. Indeed, for some time after Air Parcel started functioning, this one customer constituted the totality of its business. Air Parcel also began quite quickly to service in like fashion two other customers previously served by Exhibitors. This was done for 6 months, with both companies integrated. During April, May, and June one check after another was paid out of the Air Parcel account to the father personally, in large amounts.

There are a number of further related facts which directly support the *alter ego* reality. The incorporating papers of Air Parcel, dated March 28, 1978, show Robert Shearer as president and his son as secretary,

[2] From the Respondent's brief: "Thirty percent of the business of Air Parcel comes from the actual pickup and delivery of air freight."

each with 50 percent of the stock. This was before the men were fired. The Board's finding in its Decision and Order which underlies this backpay proceeding says literally that Exhibitors "terminated its air freight business . . . transferring . . . assets, accounts and goodwill to the newly extant corporation . . . for the purpose of frustrating the results of the election." In the face of this finding, the very assertion now by the Respondent that Air Parcel never had anything to do with the one in which its present owner personally committed the major unfair labor practices is no more than an attempt to avoid the essence of the whole case.

Air Parcel started doing business, and remained for over a year, at the same location where Exhibitors functioned, a place variously referred to as McLaughlin Run Road, and/or Moon Clinton Road. For a while both companies used the same telephone number. On this question of whether the two companies operated out of the same place, George Shearer's credibility suffers very badly, as it did at the unfair labor practice hearing. To detach Exhibitors from Air Parcel, at one point he said his father had no place of business at all but operated out of his home. The witness even said his father, who had six or seven trucks, had them all parked in his back yard! In further detail he added his father's business was carried on "in a little corner of the kitchen and on the dining room table." But Shearer then admitted that before creation of Air Parcel, as manager of Exhibitors, he worked at and out of Clinton Road, where Exhibitors had a secretary who took care of phone calls. His attempt to explain this away as a courtesy from a customer who gratuitously loaned the place to Exhibitors all that time must fail, for there is an exhibit showing he personally leased the place in the beginning of February 1978, 2 months before Air Parcel was even conceived. And finally, the election among Exhibitors' approximately 10 employees was held at the Clinton Road location. I cannot rely on anything George Shearer said at this hearing.

There are many other detailed facts supporting the *alter ego* reality, but it is unnecessary to list them all. A final one will suffice. Exhibitors was operating in part under a certain Pennsylvania Utility Commission (PUC) certificate of transportation rights. In 1977 it filed a formal application to establish such rights more formally. On March 27, 1978, the father, George Shearer, appeared at an administrative hearing on the application. Exhibitors' brief, in that proceeding, dated May 20, 1978, lists the Company's address as McLaughlin Run Road. Having lost in the administrative hearing, the father appealed the ruling by document dated August 15, 1978. At this hearing his son, George, admitted that as of that date, 6 months after Air Parcel was formed, that company was itself operating, and transporting freight, under the right claimed under that same disputed PUC license. Later, in 1981, Exhibitors nominally sold the now-established PUC right to Air Parcel. There could be no clearer proof than this that the two companies were completely integrated and acting as a single company.

I find that Exhibitors and Air Parcel were at all times *alter egos*, and that therefore under the Board's remedial order, both are directly liable for the backpay and reinstatement directed by the Board.

Backpay

Kenneth Wagner was a regular truckdriver for Exhibitors from 1976 to April 21, 1978, when, with a discharge letter signed and handed to him by George Shearer, he was fired. The very letter ties this discharge—changeover from hourly paid drivers to owner-operators—to the simultaneous discharge of the three other men here involved. That the asserted reason was the same, and that Wagner was in fact then removed from the payroll, was not disputed by the Respondent at this hearing. I find Wagner is to be covered by the remedial order issued by the Board in 1979, and that he is properly listed on the backpay specifications served on the Respondent.

George Shearer testified that 2 weeks after he discharged Wagner he offered him a job as owner-operator and that the driver refused the offer. In plain contradiction, Wagner, recalled later in rebuttal, denied he was ever offered any kind of a job after his dismissal. I credit him against Shearer. The latter's testimony, in its totality, was constantly shifting, conclusionary, evasive, and inconsistent with unquestionable facts. Indeed, he was clearly discredited in this entire case with respect to his earlier testimony in the unfair labor practice hearing, and his demeanor at this hearing served only to further lessen his credibility.

Backpay Formula

With the Respondent having changed its method of payment to a majority of its drivers—by paying a substantial number of them a percentage of the freight fare, there was no certain way of knowing how much the discharged hourly paid men would have earned during the backpay period had they not been dismissed. The fact that one or two regular hourly drivers always continued to work was not sufficient reason to look only at how much those particular men earned later, for the use of owner-operators created a confusing and unpredictable work assignment picture. In the special circumstances, the gross backpay formula underlying the specifications issued by the General Counsel is the average of the hours worked per week by the discriminatee for the 6-month period prior to the unfair labor practices, adjusted for overtime and any other hours paid, multiplied by the hourly rate of pay, and adjusted for those changes which reasonably could have been expected to have occurred during the backpay period in the absence of the discrimination. Such a formula has long been accepted as reasonable in Board proceedings of this kind. *Am-Del-Co., Inc.*, 234 NLRB 1040 (1978). The formula of necessity involves an element of uncertainty, and cannot be said absolutely to reflect the status quo there would have been had the Respondent not committed the unfair labor practices. But then, it was the unfair labor practices themselves which created the resultant uncertainty.

The Board has long held that "resolution of such doubtful and uncertain facts must be resolved in favor of the wronged party rather than the Respondent, the

wrongdoer responsible for the existence of the uncertainty." *American Medical Insurance Company, Inc.*, 235 NLRB 1417 (1978); United Aircraft Corporation, 204 NLRB 1068 (1973).

Actually the Respondent did not dispute the correctness and appropriateness of this formula. The 6-month period of actual employment, that immediately preceding the April 24, 1978, discharges, spanned the months of November through April. Other than a single question on cross-examination addressed to the Board's compliance officer, Clyde Graham, as to whether he had noticed that "twenty five percent of each year's overtime took place during November to December of each year," to which the witness responded "no," no evidence of any kind was offered to raise any doubt as to the accuracy of any of the figures appearing in the specifications as written and served on the Respondent. Indeed, there is not a single denial as to the reliability of any of the numerical facts set out—and this includes gross backpay in the formula period based on wage rates, number of hours worked by each man during the 6-month formula period, overtime adjustments, holiday pay, wage rate paid at time of termination, and raises given to hourly paid drivers during the subsequent backpay period.

The General Counsel amended the specifications in two details at the hearing, both involving discriminatee Wagner. His interim earnings for the third quarter of 1981 were increased from $1,200 to $1,819.30. This change reduced his backpay for the quarter to $2,041.70. Wagner's interim earnings for the fourth quarter of 1981 were also increased, from $800 to $1,083.95, with the result that his net backpay for that period became zero.

As to two of the employees it was conceded by the General Counsel that their total backpay period ended with finality. These are Grassinger, who was rehired by the Respondent in July 1978, and Albert Altman, who on May 31, 1980, "Removed himself from the labor market." With respect to Smay and Wagner, they have not as yet been offered reinstatement; their backpay period is therefore still running.

With the Respondent having offered no evidence, indeed not even claiming that there is any inaccuracy in the specifications as served upon it, there appears no reason for reinstating them in detail in this Decision. They are precisely part of the record as formal exhibits now in the files.

In conclusion, I find that as of this date the Respondent, meaning both Shearer Exhibitors Delivery Service and Air Parcel Delivery Service, Inc., must pay the following amounts to the discriminatees, plus the usual interest:

James Grassinger	$11,111.15
John Smay	873.01
Albert Altman	25,309.95
Kenneth Wagner	20,334.61